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Report of the Standing Committee on Transport, Infrastructure and Communities

CANADA'S OCEAN WAR GRAVES

Chair
Hon. Judy A. Sgro

MAY 2018

42nd PARLIAMENT, 1st SESSION

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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* Non-voting member, pursuant to Standing Order 104(5).

THE STANDING COMMITTEE ON TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

has the honour to present its

TWENTY-THIRD REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied ocean war graves and has agreed to report the following:

TABLE OF CONTENTS

LIST OF RECOMMENDATIONS 1

CANADA'S OCEAN WAR GRAVES 3

INTRODUCTION 3

CANADA'S OCEAN WAR GRAVES 3

UNDERWATER CULTURAL HERITAGE 5

EXISTING FEDERAL MEASURES 6

A. *Historic Sites and Monuments Act* 7

B. *Canada National Parks Act* 7

C. *Canada Shipping Act, 2001* 8

PROVINCIAL MEASURES 8

OTHER JURISDICTIONS 9

A. United Kingdom 9

B. United States 10

C. France 11

VESSEL SOVEREIGNTY AND INTERNATIONAL COOPERATION 11

PROTECTION OF CANADIAN OCEAN WAR GRAVES: THE WAY FORWARD? 12

A. Arguments Advanced in Favour of a Regulatory Approach 13

The Need for Timely Action 13

Federal-Provincial-Territorial Cooperation 13

Breadth of Applicability 13

Environmental Concerns 14

International Cooperation 14

What form would regulations take? 14

B. Arguments Advanced in Favour of Standalone Legislation 15

Symbolism 15

Applicability of Regulations to Warships 15

Flexibility 16
What form would standalone legislation take? 16
Punishments 16
Merchant ships 17
OBSERVATIONS AND RECOMMENDATIONS 17
CONCLUDING REMARKS 19

Appendix A: Maps 21
Appendix B: Ocean war graves in Canadian territorial waters. 25
Appendix C: List of witnesses 27
Appendix D: List of briefs 29
Request for government response 31

Captain Paul Bender with members of the Standing Committee on Transport, Infrastructure and Communities

Captain Paul Bender appeared before the Committee on March 19, 2018.

Left to right

1st row: Alex Bender, Captain Paul L. Bender, Patrick White (Project Naval Distinction), Vance Badaway

2nd row: Brigitte Sansoucy ; Kelly Block; Hon. Judy A. Sgro (Committee Chair); Angelo Iacono;

3rd Row: Hon. Michael D. Chong; Gagan Sikand; Ron Liepert; Ken Hardie; Sean Fraser

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That the Government of Canada draft new legislation similar to the United Kingdom's *Protection of Military Remains Act* to protect Canada's ocean war graves. 18

Recommendation 2

That the Government of Canada explore all options for using existing legislative and regulatory powers to provide immediate legal protection for ocean war graves, on an interim basis until the bill is passed. 18

Recommendation 3

That the Government of Canada ensure that any regulations or legislation governing ocean war graves provide sanctions similar to those for the desecration of land war graves. 18

Recommendation 4

That the Government of Canada make certain that the definition of an ocean war grave employed in new legislation and any future regulations appropriately addresses merchant ships to ensure that those that were sunk while in the service of the military are adequately protected. 19

Recommendation 5

That the Government of Canada ensure that the definition of an ocean war grave employed in new legislation and any future regulations is capable of immediately encompassing ocean war graves resulting from any future conflict. 19

Recommendation 6

That the Government of Canada adopt a practice of officially requesting, through diplomatic channels, that any Canadian ocean war graves that presently lay beneath foreign waters be protected to the full extent permitted under the domestic laws of the nation responsible for those waters. 19

CANADA'S OCEAN WAR GRAVES

INTRODUCTION

On 7 February 2018, the Standing Committee on Transport, Infrastructure and Communities (the Committee) heard from Mr. Patrick White (Project Naval Distinction) and Vice-Admiral (retired) Denis Rouleau about Merchant Navy veteran Captain Paul Bender's campaign to gain legal protection for Canada's ocean war graves. Persuaded by the witnesses' compelling testimony, the Committee unanimously agreed to study the issue.

Captain Bender's project aims to provide the ocean war graves of Canada's sailors with the same recognition and protection afforded to the land-based cemeteries of soldiers and airmen. As Captain Bender explained to the Committee, unlike those who served in the other branches of the Canadian Forces, the many sailors and merchant seamen who lost their lives in the First and Second World Wars are not honoured by flowers "between the crosses, row on row."[1]

Initiated in 2013, Captain Bender's project aims to remedy this imbalance and ensure "respect and gratitude" for "those young Canadian sailors whose lives were taken from them in their service to their country." The Committee endorses Captain Bender's objective and commends him on his work.

CANADA'S OCEAN WAR GRAVES

Although a number of war memorials commemorate Canada's fallen sailors and merchant seamen,[2] Captain Bender questions the practice of inscribing these sites with references to unknown graves. For example, the Halifax Memorial,[3] built to

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1 Throughout his testimony, and in his brief, Captain Bender made repeated reference to John McCrae's classic war poem *In Flanders Fields*, which opens with the lines:

> In Flanders fields the poppies blow
> Between the crosses, row on row.

2 In Canada, the Halifax Memorial is the primary memorial to those who lost their lives at sea. Another example is the Victoria Memorial, which comprises a cemetery and, in a separate plot, a Naval Memorial, bearing the names of 39 officers and men lost at sea. Sailors are also commemorated in National War Memorial in Ottawa, and the Canadian Virtual War Memorial.

3 According to Veterans Affairs Canada, the Halifax Memorial commemorates 3,267 Canadian and Newfoundland sailors and soldiers who lost their lives in the First and Second World Wars.

commemorate those who lost their lives at sea in the First and Second World Wars, bears the following inscription:

> In honour of the men and women of the navy, army and merchant navy of Canada whose names are inscribed here.
>
> Their graves are unknown but their memory shall endure.

Captain Bender contests this wording, arguing that many do have a known grave.[4] Indeed, both Vice-Admiral Denis Rouleau and Mr. White[5] explained to the Committee that Captain Bender's project originated in a desire to correct this misconception.

The term "ocean war grave" is not currently employed or defined in any Canadian statute or regulation. In a submission made to the Committee, Mr. White defined ocean war grave in the following terms:

> [The] wrecks of Canadian-registered merchant ships and warships of the Royal Canadian Navy lost through enemy action that contain the remains of personnel (including their apparel and personal effects) associated with those vessels.[6]

While many commentators appear to apply the term to vessels sunk during twentieth century conflicts, testimony from Mr. Marc-André Bernier (Manager, Underwater Archaeology, Parks Canada Agency) notes that some military wrecks in Canadian waters date back to the "time of the colonies." This suggests that the term "ocean war grave" is not universally understood to apply exclusively to twentieth century conflict.

Witness testimony also revealed a degree of uncertainty as to the exact number of ocean graves in Canadian waters. Mr. Bernier estimated that approximately 30,000 to 40,000 shipwrecks lie in and around the Great Lakes, the St Lawrence and the coast of Canada, although he did not specify how many lives had been lost with the vessels, or how many wrecks were the result of conflict. Ms. Ellen Bertrand (Director, Cultural Heritage Strategies, Parks Canada Agency) noted that a "small but significant portion" of Canada's historic shipwrecks were military wrecks. She further explained that, over and above the wrecks of vessels and airplanes belonging to the Canadian Forces, at least 50 military wrecks belonging to foreign governments have been located in Canadian

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4 This information was provided to the Committee by Captain Paul Bender in a reference document entitled "Ocean War Graves."

5 Project Naval Distinction, *Project Ocean War Graves: Situation Report as at August 16, 2016*.

6 Project Naval Distinction, *Protecting Canada's Ocean War Graves*, 7 February 2018.

waters, the vast majority of which are the property of the United Kingdom, France and the United States.

With regard to twentieth century ocean war graves in both Canadian and foreign territorial waters, a somewhat clearer picture emerged. Vice-Admiral Rouleau provided the Committee with the following information:

> Here in Canada alone, we have nine warships within Canadian territorial waters, and ten merchant ships that were sunk due to enemy action. All those vessels are known. Their positions are known. The number of people on board are known.[7]

In written briefs provided to the Committee, both Captain Bender and Mr. White report that the 19 wrecks in Canadian waters are the final resting place of 480 sailors. The brief submitted by Mr. White estimates that this figure rises to 1,200 Canadian sailors and mariners when Canadian ocean war graves in overseas territorial waters are taken into consideration. According to Captain Bender, three Canadian vessels lie in U.K. territorial waters and two in French territorial waters. In addition, as is indicated in the maps contained in Appendix A, sunken Canadian warships can be found in the Atlantic Ocean and in the Mediterranean sea.

The campaign to gain adequate legal recognition for Canada's ocean war graves is both symbolic and practical in nature. Beyond the symbolic importance of placing the three branches of the Canadian Forces on an equal footing, legal protection for ocean war graves is needed to respond to growing concern about the looting and desecration of ocean war graves. In testimony provided to the Committee, Mr. White informed members that "blood-stained canvas hammocks, used by Canadian soldiers on the ocean liner RMS *Hesperian* were found off the coast of Ireland indicating the ocean war grave had recently been disturbed."[8]

UNDERWATER CULTURAL HERITAGE

To a certain extent, Captain Bender's objective aligns with that of United Nations Educational, Scientific and Cultural Organization (UNESCO) 2001 *Convention on the Protection of the Underwater Cultural Heritage* (the 2001 Convention). The 2001 Convention, which entered into force in 2009, represents the "response of the

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7 See Annex B.

8 Project Naval Distinction's brief also makes reference to the recent discovery that "three Dutch ships from the Second World War, considered gravesites, resting in the Java Sea ... [were found] ... to have been completely salvaged."

international community to the increasing looting and destruction of underwater cultural heritage."

Canada has not yet ratified the 2001 Convention and Ms. Bertrand noted that, prior to doing so, "Canada would need to demonstrate that adequate measures are in place to protect underwater cultural heritage, including heritage wrecks."

Underwater cultural heritage is defined in the 2001 Convention as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years."[9] As such, ocean war graves can be considered a category of underwater cultural heritage.[10]

While witnesses voiced concern about failing to adequately distinguish between ocean war graves and underwater cultural heritage, Captain Bender nonetheless suggested that there should not be "too much of a separation between a heritage wreck and an ocean war grave, because in certain respects they are synonymous." However, he also expressed concern that ocean war graves have been "completely forgotten, whereas heritage matters have not."

As part of the 2014–2018 commemoration of the centenary of the First World War, the international community has been considering how First World War underwater cultural heritage can best be preserved. In a 2014 publication, UNESCO noted that "the underwater cultural heritage of WWI has been extensively damaged through salvage, looting and industrial activity over the past hundred years, and legal protection has been insufficient."[11] UNESCO hopes that the 2001 Convention "will prove very useful in the fight to preserve them."

EXISTING FEDERAL MEASURES

In a written brief submitted by the Parks Canada Agency, Ms. Joëlle Montminy (Vice-President, Indigenous Affairs and Cultural Heritage, Parks Canada Agency) noted that "there is currently no specific federal process for the designation of ocean war graves." Nevertheless, in the course of the Committee's study, witnesses discussed three existing

9 UNESCO, Underwater Cultural Heritage: Text of the 2001 Convention, Article 1.

10 However, while underwater cultural heritage can comprise ocean war graves, Second World War wrecks would not yet meet the UNESCO definition of underwater cultural heritage for the purposes of the 2001 Convention.

11 UNESCO, *Underwater Cultural Heritage from World War I*, Proceedings of the Scientific Conference on the Occasion of the Centenary of World War I, Belgium, June 2014, p. 5.

statutes that have been used, or could be used, to offer some degree of protection or recognition for shipwrecks. Like the 2001 Convention, these domestic measures address cultural heritage in general rather than ocean graves in particular.

A. *Historic Sites and Monuments Act*

The *Historic Sites and Monuments Act* authorizes the Minister responsible for the Parks Canada Agency to take a range of measures to commemorate historic places. In carrying out his or her powers under the Act, the minister is advised by the Historic Sites and Monuments Board of Canada (the Board). Following a thorough evaluation process and a positive recommendation by the Board, the minister declares a site, event or person to be of national historic significance.

In her brief, Ms. Montminy explained that "designation as a national historic site does not in itself provide legal protection, but is intended to raise awareness of and commemorate the site's historic significance." In a subsequent submission, the Parks Canada Agency added that no wrecks of Canadian Forces vessels in Canadian waters are currently designated as national historic sites.[12]

The "ceremonial" nature of the designation was of concern to Mr. White, who noted that substantive legal protection was needed. He also stressed that it is important to distinguish between honouring wrecks "as part of our history" and honouring ocean war graves, which are tombs of lost sailors.

B. *Canada National Parks Act*

Section 42(1)(a) of the *Canada National Parks Act* allows Cabinet to set aside land as a "national historic site of Canada in order to commemorate a historic event or preserve a historic landmark."[13] The schedule to the *National Historic Sites of Canada Order* (the Order) lists the National Historic Sites of Canada. The geographic zone surrounding and encompassing the wrecks of the HMS *Erebus* and the HMS *Terror* appears on the Order as the "wrecks of HMS *Erebus* and HMS *Terror* National Historic Site of Canada."[14]

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12 Information provided to Committee staff.

13 Parks Canada, "HMS *Terror* Added to the Wrecks of HMS *Erebus* and HMS *Terror* National Historic Site," News release, 15 December 2017.

14 For further information on the HMS *Erebus* and HMS *Terror*, see Parks Canada, "HMS *Terror* Added to the Wrecks of HMS *Erebus* and HMS *Terror* National Historic Site," News release, 15 December 2017.

In evidence provided to the Committee, Mr. Bernier intimated that, for a variety of legal and operational reasons, this measure would not easily be applied to other wrecks.[15]

C. *Canada Shipping Act, 2001*

Section 163(2) of the *Canada Shipping Act, 2001* provides that Cabinet may, on the joint recommendation of the Minister of Transport and the Minister responsible for the Parks Canada Agency, make regulations governing wrecks or classes of wreck that have heritage value. Ms. Montminy informed the Committee that Bill C-64, an Act respecting wrecks, abandoned, dilapidated or hazardous vessels and salvage operations "would transfer these authorities to section 131 of the new Act."

The Committee was surprised to learn that, although this regulatory power has existed since 2007, and although preparatory work was undertaken between 2004 and 2011, no regulations have yet been introduced to protect heritage wrecks in Canada. That said, Ms. Bertrand noted that the Government of Canada considers that regulations "would provide an effective solution to protect all heritage wrecks in Canadian waters under Canadian jurisdiction, including those that may be considered ocean war graves." To that end, Ms. Bertrand explained that work on regulatory preparedness was once again underway:

> The button has been pushed, I would say, because we've dusted them off and we're starting to talk with our colleagues in other governments and starting to engage with our federal-provincial-territorial colleagues at the culture and heritage table.

PROVINCIAL MEASURES

Although the federal government has jurisdiction over navigation and wrecks, the protection of heritage and cultural property has been held to fall within provincial jurisdiction."[16]

Departmental witnesses made reference to the provinces' role in protecting underwater cultural heritage on several occasions. For example, Mr. Bernier noted that the provinces have "archaeological legislation for the seabed." In addition, Ms. Bertrand noted that British Columbia has "very strong protection for underwater cultural heritage." She made reference to the *Heritage Conservation Act*, which provides protection for heritage wrecks, noting that the province requires researchers to obtain a permit prior to conducting any research on those wrecks.

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15 A more detailed analysis of these reasons was subsequently provided to Committee staff.

16 See discussion in Peter W.Hogg, *Constitutional Law of Canada*, Volume 1, 5th edition at para 21.11 (c).

Ms. Bertrand further explained that the Province of Quebec has put in place "specific legal measures" to protect the RMS *Empress of Ireland* "in response to years of looting at the site." The RMS *Empress of Ireland* sank in the estuary of the St. Lawrence in 1914 and the resulting loss of over 1,000 lives made it the worst peacetime maritime disaster in Canadian history. In spite of Quebec's success in protecting this historic shipwreck, Ms. Bertrand observed that "very few wrecks have been designated by the provinces and territories."

OTHER JURISDICTIONS

Canada is not the only country concerned about the growing vulnerability of ocean war graves. In recent years, a number of jurisdictions have introduced legislation to better protect the final resting place of those who died in the service of their country. In particular, witnesses discussed the United States, the United Kingdom and France.

A. United Kingdom

The *Protection of Military Remains Act 1986* (PMRA) was introduced in response to concerns that military wrecks were inadequately protected.[17] Mr. Bernier noted that, like the U.S. legislation (discussed below), the U.K. legislation addresses military wrecks in general rather than war graves in particular.

The PMRA applies both to vessels that sunk, and aircraft that crashed, while in military service.[18] The PMRA prohibits "sea users" from engaging in a number of activities in regard to controlled sites and designated vessels.[19] Failure to respect certain statutory prohibitions is a criminal offence.[20] Nevertheless, the legislation also provides for a

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17 According to British legal scholar Sarah Dromgoole, the particular catalyst was the Ministry of Defence's frustration over its inability to prevent a German consortium from diving on the wreck of HMS *Hampshire*, which sank off the Orkney Islands (Scotland) in World War I. Despite being refused permission to dive on the site, the consortium continued to do so and removed a number of items from the wreck, including personal belongings (Sarah Dromgoole "United Kingdom" in Sarah Dromgoole (ed.), *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, Martinus Nijhoff Publishers, 2006 (2nd edition), p. 329).

18 *Protection of Military Remains Act*, Section 1. Note, however, that while the PMRA applies automatically to aircraft, the Secretary of State for Defence must make an order to designate a vessel as a protected place or a site as a controlled site (Dromgoole (2006), p. 329).

19 Department of Defence (U.K.), *The Military Maritime Graves and the Protection of Military Remains Act 1986: A Consultation Document by the Ministry of Defence*, February 2001.

20 Ibid, p. 9 and p. 11 For further details of the various offences under the PMRA see Dromgoole (2006), p. 330.

licensing regime to allow diving and other activities (e.g., salvaging) at controlled sites or protected places in certain circumstances.[21]

The legislation may be applied in the United Kingdom, in the territorial waters of the United Kingdom, or in international waters.[22] However, it may not be used in the territorial waters of another state.[23] Furthermore, in international waters, offences may be committed only by someone on board a British-controlled ship, or by a British citizen.[24]

Schedule 1 of the *Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2017* lists 79 vessels as "designated vessels" and 12 sites as "controlled sites." Certain German vessels are listed in the schedule to the PMRA.[25] According to Captain Bender, the U.K. government is willing to apply U.K. law to protect three Canadian warships that rest in U.K. territorial waters. Mr. Bernier noted that the U.K. government requires the Canadian government to take a "proactive" approach in order for this to be achieved.

In evidence provided to the Committee, Vice-Admiral Rouleau and Mr. White recommended that Canada introduce legislation similar to the PMRA. Mr. White further recommended that this legislation "be given an informal title of the "Captain Paul Bender Act" in honour of the man and veteran who has proudly carried the torch on this important issue."

B. United States

In 2004, the United States introduced the *Sunken Military Craft Act* (SMCA), which seeks to "protect sunken military vessels and aircraft, and the remains of their crew, from unauthorized disturbance."[26] As Mr. Bernier noted, the Act's application is not limited to historic sunken military craft of the United States, but applies also to vessels belonging to other nations. Like the U.K. legislation, the SMCA provides for a permitting process to allow activities that are otherwise prohibited.[27]

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21 For further details, see discussion in Dromgoole (2006), p. 330.

22 PMRA, section 1(6) and section 1(2)(b).

23 Dromgoole (2006), p. 329.

24 PMRA section 3(1).

25 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge University Press, 2013, p. 139.

26 National Oceanic and Atmospheric Administration [NOAA], *Sunken Military Craft Act*, p. 1.

27 Ole Varmer, "United States of America" in Sarah Dromgoole (ed.), *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, Martinus Nijhoff Publishers, 2006 (2nd edition), p. 369.

C. France

Unlike the United Kingdom and the United States, France has not enacted specific legislation designed to protect sunken military warships.[28] Nevertheless, France has taken measures to ensure that human remains are undisturbed. As Mr. Bernier explained, this is achieved through "archeological laws that protect...[culture]...at large."

Captain Bender praised the French system, noting that he was able to successfully negotiate protection for the HMCS *Athabascan* and the HMCS *Guysborough*, two Canadian shipwrecks that rest in France's exclusive economic zone, within a period of five months. Ms. Bertrand confirmed that the French legislative framework allows for the automatic protection of heritage wrecks.

VESSEL SOVEREIGNTY AND INTERNATIONAL COOPERATION

Captain Bender wishes to ensure protection for both Canadian ocean war graves in Canadian waters and those that rest in foreign waters. This raises complex jurisdictional issues relating to vessel ownership and state sovereignty over territorial sea. On the one hand, the *United Nations Convention on the Law of the Sea* (UNCLOS) provides sovereign immunity to ships owned or operated by a state and used only on government non-commercial service; on the other hand, UNCLOS also provides coastal states with sovereignty over their territorial seas.[29]

Ms. Montminy explained the interplay between these two strands of the law in the following terms:

> International maritime law protects the sovereign immunity of military vessels and relies on the authority of the State with jurisdiction over the territorial waters to protect these wrecks.

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28 Gwénaelle Le Gurun, "France" in Sarah Dromgoole (ed.), *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001*, Martinus Nijhoff Publishers, 2006 (2nd edition), p. 67.

29 Articles 95 and 96 of the *United Nations Convention on the Law of the Sea* provide that warships and other ships "owned or operated by a state and used only on government non-commercial service" are protected by the principle of sovereign immunity. This principle extends, subject to certain caveats, to "such vessels sailing in the EEZ of another state and ... in the territorial sea of another state." (Dromgoole, (2013), p. 136) However, article 2 of UNCLOS extends the sovereignty of a coastal State beyond its land territory and internal waters to its territorial sea. This creates a "clear tension between the sovereignty of a coastal state over its territorial sea and the notion that a wreck is sovereign immune and therefore subject to the exclusive jurisdiction of the flag state" (Dromgoole (2013), p. 139).

She noted that the Parks Canada Agency has been "identified by foreign governments to act on its behalf in ensuring the appropriate management of these (foreign owned) wrecks," and provided the Committee with examples of cooperation between Canada and foreign governments. For example, she informed the Committee that Canada and the United Kingdom concluded a Memorandum of Understanding "concerning the management of the wrecks of the HMS *Erebus* and HMS *Terror* in Nunavut."

In turn, Ms. Bertrand discussed cooperation between Canada, the United Kingdom, the United States and France in developing a draft agreement to protect the wreck of RMS *Titanic*, which is located on the edge of the Canadian continental shelf, beyond the exclusive economic zone.

Other witnesses also discussed the important role of diplomacy in ensuring protection for wrecks lying in foreign jurisdictions. Mr. Bernier provided the following example:

> In 2009, an American PBY airplane[30] was found with human remains in the St. Lawrence. At that time, knowing when we found the plane that there were human remains inside, we stopped everything, contacted the U.S. through the former department of foreign affairs, and worked with them to recover—they wanted to recover the human remains to repatriate them, so we helped them out.

In his appearance before the Committee, Vice-Admiral Denis Rouleau flagged the difficulties that can arise when international cooperation is required. He explained that Captain Bender requested that the United Kingdom place three Canadian corvettes that sank in British territorial waters under the protection of the PMRA. According to the Vice-Admiral, the United Kingdom requires Canadian assent before it can protect Canadian vessels. Mr. Bernier explained that, in contrast to the British approach, the French will begin by protecting the foreign heritage asset and then "contact the country ... [which] ... can say yes or no."

PROTECTION OF CANADIAN OCEAN WAR GRAVES: THE WAY FORWARD?

The Committee's study revealed two possible avenues the federal government could follow to ensure protection for ocean war graves: regulation and standalone legislation.

30 PBY boats were a series of "flying boats" originally conceived to meet military requirements.

A. Arguments Advanced in Favour of a Regulatory Approach

Officials from the Parks Canada Agency strongly favoured pursuing a regulatory avenue. Their arguments can be grouped under five overarching headings.

The Need for Timely Action

Among several arguments advanced by Parks Canada in favour of a regulatory approach, Ms. Bertrand emphasized the relative speed at which regulations could be put into place:

> There's a regulatory process, obviously. We need to do consultations and have public comment periods. Our hope is that if we had the momentum and capacity, they could potentially be implemented by the end of 2019 or early 2020.

Federal-Provincial-Territorial Cooperation

Ms. Bertrand noted that regulations could be developed to resolve inconsistencies between provincial or territorial legislation and federal legislation. For example, she noted that the *Canada Shipping Act, 2001* "actively rewards" people for doing salvage work, whereas some provinces have legislation designed to prevent salvage activities.[31] Ms. Bertrand further noted that the provinces supported coordinated regulations that would get rid of inconsistencies between federal and provincial law.

In Ms. Bertrand's view, regulations would bring certainty and clarity to "all involved":

> Our view is that the regulations would bring much-needed clarity and protection, because right now you're dealing with the variability of provincial and territorial legislation, and there's nothing protecting anything in federal waters right now.

Breadth of Applicability

Mr. Bernier stressed that regulations have the benefit of being able to protect wrecks other than ocean war graves:

> From our perspective, those are one classification of wrecks that have loss of life, but there are others. There are a lot of other losses of life. That's why we believe that the regulations—as prepared and as thought of and as we've worked on them—would allow us to encompass everything, including those that are not military, but merchant vessels.

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31 See, for example, British Columbia's *Heritage Conservation Act*, section 13(2) (e).

A similar point was made by Ms. Bertrand who noted that human remains are found on wrecks other than those of military vessels. She argued that regulations would "provide an effective solution to protect all heritage wrecks in Canadian waters under Canadian jurisdiction, including those that may be considered ocean war graves."

Environmental Concerns

While noting that the Parks Canada Agency is "not aware of any military wrecks that currently pose a hazard to the environment or navigation," Ms. Montminy explained that "any operations required to address risks to navigation, the environment or public safety could be accommodated under future heritage wreck regulations."

International Cooperation

Ms. Bertrand asserted that "heritage wreck regulations would also support Parks Canada's ratification of international agreements that would help to protect wreck sites at the international level, including sites that contain human remains."

Ms. Montminy also addressed international cooperation, explaining that future regulations would allow Canada to ensure that foreign military wrecks were protected.

What form would regulations take?

In setting out its case for regulations, the Parks Canada Agency provided an overview of the key features of the proposed regulations. According to the officials who provided evidence, the regulations would:

- define a "designated heritage wreck" as any wreck over 50 years old;
- exclude heritage wrecks from salvage provisions in other statutes. According to Ms. Bertrand, this would remove the "incentive to go after a wreck and bring up artifacts;"
- introduce permits for wreck exploration;
- provide for interim protection zones in order to "protect the area around a ship where there might be a debris field;"
- introduce mandatory reporting requirements and develop a database of wrecks; and;
- ensure coordination with the provinces and territories to avoid duplication.

B. Arguments Advanced in Favour of Standalone Legislation

In contrast, other witnesses expressed reservations about the use of regulations. Their arguments focussed on the following three points:

Symbolism

The primary argument against regulations – and in favour of standalone legislation – was the view that war graves deserve to be addressed as a unique category of protected site, distinct from other ocean graves.

Mr. White made this point forcefully, arguing that regulations would not capture the symbolic significance of ocean war graves. He cautioned that "lumping" ocean war graves with other heritage property would fail to "capture the spirit of what an ocean war grave really is."

Applicability of Regulations to Warships

Captain Bender also expressed concern that the regulations would not protect warships, as section 7(1) of the *Canada Shipping Act, 2001* excludes vessels owned and operated by the Canadian Forces from the application of the Act. Due to these jurisdictional concerns, Captain Bender expressed a preference for separate legislation governing state vessels.

In response to Captain Bender's concerns, Parks Canada provided the following information:[32]

> The exclusion of military vessels under section 7 is intended to ensure that active military vessels are not compelled to comply with the requirements of the *Canada Shipping Act, 2001*. Preliminary analysis suggests that this exclusion would not prevent the use of the proposed heritage wreck regulations to control access to the site surrounding a military wreck or activities directed at a military wreck undertaken by third parties for the purpose of protecting heritage wreck. Further legal analysis is required to confirm and clarify the intent and the extent of this exclusion.
>
> Parks Canada is currently working with National Defence and Transport Canada to explore opportunities to provide legal protection of wrecks of military vessels under the proposed heritage wreck regulations and to ensure legal clarity on this matter.

32 Information provided to Committee staff in email correspondence.

Flexibility

Mr. White expressed concern that heritage regulations look back in time, protecting wrecks that were lost before a particular date in history. He made the argument that standalone legislation would allow the government to offer protection to future wrecks as soon as loss of life occurred:

> If you have to wait 50 years for something to be designated a heritage property, then the benefit of having legislation similar to that of the U.K. is that it's also forward-looking. God forbid that anything happens in the future, but the navy does take risks. I know, because I've also deployed. With separate legislation that doesn't classify naval wrecks or something to that effect as just heritage property, you could have protection that exists the minute those vessels or even aircraft go down. I think there was an issue in just the last few weeks when a United States Air Force plane went down with a pilot inside.

What form would standalone legislation take?

Both Vice-Admiral Rouleau and Mr. White recommended that Canada introduce legislation similar to the United Kingdom's PMRA. In particular, they drew attention to the importance of adequate sanctions and carefully defined applicability.

Punishments

Both Captain Bender and Mr. White stressed the importance of ensuring that any punishment made pursuant to the regulations should be commensurate with the gravity of the offensive act. Specifically, Mr. White recommended to the Committee that punishments for disturbing ocean war graves should be consistent with those handed down for the "desecration of land-based war graves."

At a federal level, Section 182 (b) of the *Criminal Code* provides that anyone who "improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not, is guilty of an indictable offence and is liable to imprisonment of a term not exceeding five years."

Provincial legislation also includes prohibitions against disturbing burial sites. For example, section 101(1) of the *Funeral, Burial and Cremation Service Act, 2002* provides that "no person shall alter or move the remains or marker of a Canadian or Allied veteran or a Commonwealth War Burial without the agreement of the Department of Veterans Affairs (federal), the Commonwealth War Graves Commission, or such other persons and associations as are prescribed." Section 94 further provides that no person shall disturb "a burial site or artifacts associated with human remains" unless authorized to do so.

Currently, regulations regarding heritage wrecks can be made under the *Canada Shipping Act, 2001*. Section 164(1) of the *Canada Shipping Act, 2001* provides that any person who contravenes a regulation made under section 163 is guilty of an offence and liable on summary conviction to a fine of not more than $100,000 or to imprisonment for a term of not more than one year, or to both. Under Bill C-64, every individual who contravenes a provision of the regulations is liable on summary conviction to a fine of not less than $5,000 and not more than $300,000 or to imprisonment for a term of not more than six months, or to both.

Merchant ships

Mr. Bernier informed the Committee that some 72 merchant navy vessels were lost during the Second World War, resulting in the loss of more than 1,500 lives. Captain Bender explained to the Committee that the U.K.'s PMRA has been used to provide protection to at least one merchant navy ship, the SS *Storaa*.

The SS *Storaa* was granted protection under the PMRA following a High Court ruling in 2005. As the PMRA provides protection to only those vessels that have been in military service, the decision turned on whether the vessel was in service with the armed forces at the time of its sinking.[33] As Professor Dromgoole explains, "Mr. Justice Newman concluded that the *Storaa* had "a common purpose" with the military escort vessel accompanying the convoy and therefore could be said to be "in service with" that vessel."[34]

Captain Bender supports the distinction between merchant ships and warships, noting that "there should be no special protection for merchant ships unless it has been determined that the activity in which they were involved was definitely in support of the armed forces."

OBSERVATIONS AND RECOMMENDATIONS

The Committee recognizes that the Parks Canada Agency has already undertaken extensive preparatory work for the introduction of regulations governing heritage wrecks; however, it also notes that the arguments advanced by Mr. White in favour of standalone legislation carry considerable force. Further, it notes that a number of arguments put forward by the Parks Canada Agency in favour of a regulatory approach could equally be used in support of standalone legislation. For example, while accepting

33 Dromgoole (2006), p. 334.

34 Dromgoole (2006), p. 335.

Ms. Montminy's argument that future regulations could protect foreign military wrecks in Canadian waters, it appears that other jurisdictions, including the United Kingdom, achieve this objective by means of standalone legislation.

In particular, the Committee considers that ocean war graves should be treated separately from other types of underwater cultural heritage. Naturally, the Committee supports the protection of all assets that have been designated as underwater cultural heritage and agrees that all human remains should be treated with the utmost respect. Nonetheless, it believes that the unique sacrifice of those who died in service of their country is worthy of particular recognition and remembrance. Accordingly, the Committee recommends:

Recommendation 1

That the Government of Canada draft new legislation similar to the United Kingdom's *Protection of Military Remains Act* to protect Canada's ocean war graves.

However, noting that mariners and their families have shouldered the burden of protecting the memory of their war dead for too long the Committee further recommends:

Recommendation 2

That the Government of Canada explore all options for using existing legislative and regulatory powers to provide immediate legal protection for ocean war graves, on an interim basis until the bill is passed.

In developing legislation, as well as any regulations to be used in the interim period, the Committee is of the opinion that, in addition to the factors set out by the Parks Canada Agency, the government should also address certain other equally important considerations. Specifically, attention should be given to sanctions, the protection of merchant ships and the protection of ocean war graves resulting from future conflict. Accordingly, the Committee recommends:

Recommendation 3

That the Government of Canada ensure that any regulations or legislation governing ocean war graves provide sanctions similar to those for the desecration of land war graves.

Recommendation 4

That the Government of Canada make certain that the definition of an ocean war grave employed in new legislation and any future regulations appropriately addresses merchant ships to ensure that those that were sunk while in the service of the military are adequately protected.

Recommendation 5

That the Government of Canada ensure that the definition of an ocean war grave employed in new legislation and any future regulations is capable of immediately encompassing ocean war graves resulting from any future conflict.

Finally, the Committee observes that diplomacy plays an important role in protecting Canadian warships in overseas territorial waters. It encourages the government to continue to work with its international counterparts to ensure that those who lost their lives far from Canadian shores are treated with dignity and respect. In particular, it recommends:

Recommendation 6

That the Government of Canada adopt a practice of officially requesting, through diplomatic channels, that any Canadian ocean war graves that presently lay beneath foreign waters be protected to the full extent permitted under the domestic laws of the nation responsible for those waters.

CONCLUDING REMARKS

The Committee thanks Captain Bender for championing this important campaign over the past five years. His efforts have not been in vain. His call to action has been heard and the Committee will be vigilant in monitoring the progress of this important matter.

At the going down of the sun and in the morning, let us remember not only those who lie in *Flanders fields*, but also those who rest *full fathom five*,[35] forever entombed in their ocean graves.

35 William Shakespeare, *The Tempest*, (Act 1, scene 2). Known as "Ariel's song," *Full fathom five thy father lies* is a verse sung by Ariel to the shipwrecked Ferdinand.

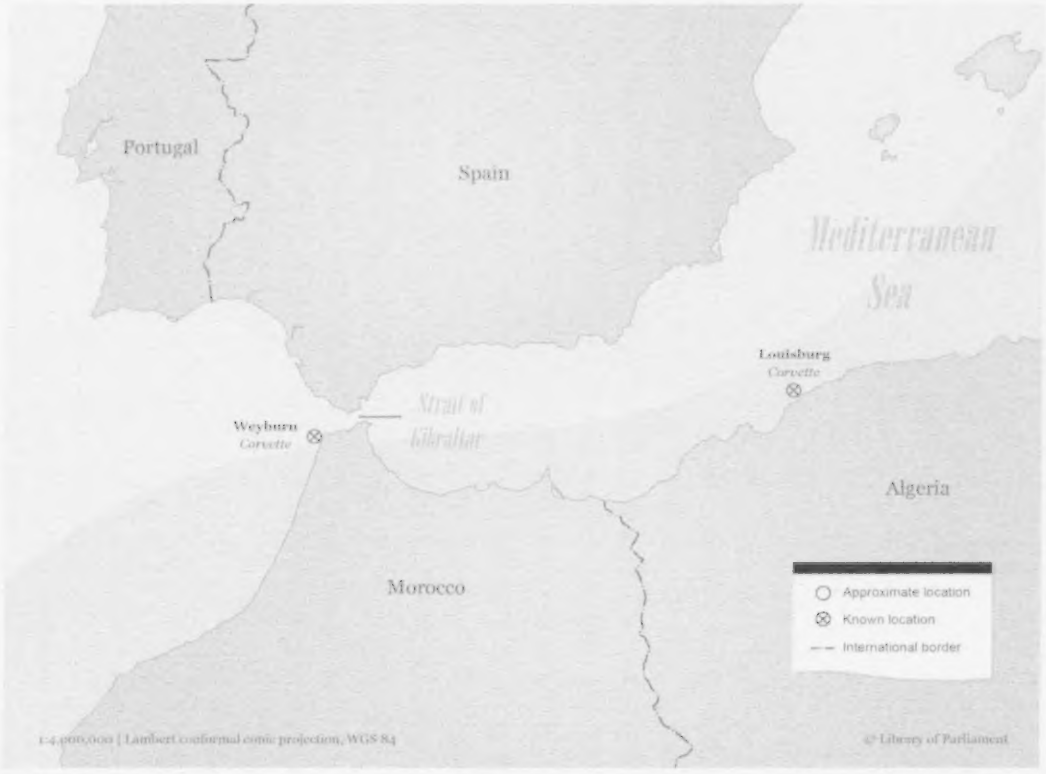
APPENDIX A: MAPS

MAP 1: World War II Royal Canadian Navy Warship Losses – Eastern Canada

MAP 2: World War II Royal Canadian Navy Warship Losses – North Atlantic

MAP 3: World War II Royal Canadian Navy Warship Losses – Europe

MAP 4: World War II Royal Canadian Navy Warship Losses – Mediterranean



Maps prepared by the Library of Parliament, Ottawa, 2018, using data from W.A.B. Douglas et al., "Appendix II, RCN Warship Losses, 1939-1945," in *A Blue Water Navy: The Official Operational History of the Royal Canadian Navy in the Second Word War, 1943-1945, Volume II, Part 2,* Vanwell Publishing Limited, St. Catherines, Ontario, 2007, pp. 566–567; Natural Resources Canada (NRCan), "Boundary Polygons," in *Atlas of Canada National Scale Data 1:5,000,000 Series,* NRCan, Ottawa, 2013; and Natural Earth, *1:10m, 1:50m and 1:110m Cultural Vectors*, version 4.0.0. The following software was used: Esri, ArcGIS, version 10.4. Contains information licensed under *Open Government Licence – Canada*.

APPENDIX B: OCEAN WAR GRAVES IN CANADIAN TERRITORIAL WATERS

In a supplementary submission to the Committee, Captain Bender provided details of the number of lives lost in the each of the Royal Canadian Navy Ships sunk in Canadian territorial waters.

Name of ship	Location	Lives lost
HMCS *Charlottetown*	Cap Chat, St. Lawrence River	10
HMCS *Racoon*	Gaspe coast	37
HMCS *Bras d'Or*	Gulf of St. Lawrence	30
HMCS *Otter*	11 km. S. of Sambro Is.	19
HMCS *Windflower*	Off Grand Banks, Nfld.	23
HMCS *Chedabucto*	48° 14'N 69° 16'W	1
HMCS *Shawinigan*	47° 34'N 59° 11'W	91
HMCS *Esquimalt*	44° 26'N 63° 10'W	44
HMCS *Clayoquot*	Off Sambro Is.	8

In addition, Captain Bender provided the coordinates of the 10 Canadian-registered merchant vessels that lie in Canadian territorial waters. These wrecks are the final resting place of 217 souls.

Name of ship	Location	Lives lost
Livingston	46° 15'N 58° 05'W	14
Kitty's Brook	42° 56'N 63° 59'W	9
Caribou	59° 28'N 35° 44'W	137

Name of ship	Location	Lives lost
Donald Stewart	50° 32′N 58° 46′W	3
Oakton	48° 50′N 63° 46′W	3
Watuka	44° 30′N 61° 51′W	1
Rose Castle	47° 36′N 52° 58′W	35
Nipiwan Park	44° 28′N 62° 59′W	2
Carolus	48° 47′N 68° 10′W	11
Liverpool Packet	43° 20′N 66° 20′W	2

APPENDIX C
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
As an individual	2018/03/19	94
Paul L. Bender, Capt(MN) (Ret'd)		
Department of National Defence		
Steve Harris, Acting Director, Chief Historian Directorate of History and Heritage		
Department of Transport		
Ellen Burack, Director General Environmental Policy		
Nancy Harris, Executive Director Regulatory Stewardship and Aboriginal Affairs		
Parks Canada Agency		
Marc-André Bernier, Manager Underwater Archaeology		
Ellen Bertrand, Director Cultural Heritage Strategies		
Project Naval Distinction		
Patrick White, Founder and Executive Director		

APPENDIX D
LIST OF BRIEFS

Organizations and Individuals

Bender, Paul, Capt(MN) (Ret'd)

Project Naval Distinction

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 94 and 103) is tabled.

Respectfully submitted,

Hon. Judy A. Sgro
Chair